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August 1, 2007

VIA MESSENGER

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
c/o Natek Inc.
236 Massachusetts Avenue, N.E.
Suite 110
Washington, DC 20002

FILED/ACCEPTED

AUG - 1 2007

Federal Communications Commission
Office of the Secretary

Re: *Arkansas Cable Telecommunications Ass'n, et al. v. Entergy Arkansas, Inc.*, EB Docket
No. 06-53, EB-05-MD-004; Motion for Protective Order

Dear Ms. Dortch:

Enclosed for filing please find the original and six copies of Entergy Arkansas, Inc.'s Motion for a Protective Order in the above referenced docket. In addition, we request that you date-stamp the additional copy provided and return it with the messenger.

Thank you for your assistance in this matter. Should you have any questions, please do not hesitate to contact the undersigned.

Very truly yours,



Shirley S. Fujimoto

Counsel for Entergy Arkansas, Inc.

Enclosures

No. of Copies rec'd 0+6
LW: ABCDE

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

**FILED/ACCEPTED
AUG - 1 2007**

Federal Communications Commission
Office of the Secretary

| | | |
|---|---|---------------------|
| In the Matter of |) | |
| |) | |
| Arkansas Cable Telecommunications |) | EB Docket No. 06-53 |
| Association; Comcast of Arkansas, Inc.; |) | |
| Buford Communications I, L.P. d/b/a |) | |
| Alliance Communications Network; |) | |
| WEHCO Video, Inc.; and TCA Cable |) | EB-05-MD-004 |
| Partners d/b/a Cox Communications, |) | |
| |) | |
| <i>Complainants,</i> |) | |
| |) | |
| v. |) | |
| |) | |
| Entergy Arkansas, Inc., |) | |
| |) | |
| <i>Respondent.</i> |) | |

To: Office of the Secretary
Attn: The Honorable Arthur I. Steinberg
Administrative Law Judge

MOTION FOR A PROTECTIVE ORDER

Pursuant to Part 1.313 of the Commission's Rules, 47 C.F.R. § 1.313, Respondent Entergy Arkansas, Inc. ("EAI"), through undersigned counsel, hereby moves for the issuance of a protective order regarding certain documents currently in the custody of Utility Support Systems, Inc. ("USS") for which a claim of privilege has been or may be asserted (the "covered documents"). Specifically, for the reasons set forth herein, EAI respectfully requests the Administrative Law Judge ("ALJ") to:

1. Order that the production or disclosure of the covered documents to Complainants be prohibited unless and until EAI has been provided a full and fair opportunity to assert on its own behalf any and all claims to which it may be entitled;
2. Stay the consideration of any pending or forthcoming claims or challenges regarding privilege, as well as order a stay on the filing of any pleadings or submissions regarding any such claims or challenges, until at least fourteen

business days after the Parties have exchanged privilege logs,¹ in keeping with the Parties' pre-existing agreement regarding the procedures to be followed in resolving discovery-related disputes; and

3. Order that copies of all filings, pleadings, motions, requests for action from the ALJ (other than requests for the issuance of subpoenas), or any other submissions that are made in this proceeding be served on all Parties to this proceeding.

Finally, notwithstanding the outcome of the instant Motion or any other pleading, ruling, inquiry, or other action that may be taken with respect to the covered documents, EAI hereby reserves its right, pursuant to Section 1.301(a)(2) of the Commission's rules, 47 C.F.R. § 1.301(a)(2), to appeal any ruling or other action on a claim of privilege that would require the production or disclosure of the covered documents to Complainants.

EAI clarifies that the instant Motion does not purport to address the merits of any claims of privilege regarding the covered documents. Rather, the purpose of this Motion for a Protective Order is to protect EAI's rights and standing to assert and advocate its claims of privilege regarding the covered documents before any ruling or other decision is made that may require the production or disclosure of the covered documents to Complainants.

EAI submits that the issuance of the requested protective order pursuant to Section 1.313 of the Commission's Rules, 47 C.F.R. § 1.313, is appropriate and just for the purpose of protecting Respondent EAI and for the purpose of providing for the proper conduct of this proceeding. The issuance of the requested protective order is furthermore consistent with the ALJ's authority under Section 1.243(f) of the Commission's Rules, 47 C.F.R. § 1.243(f), to "[r]egulate the course of the hearing," the Commission's authority under Section 1.1415 of the pole attachment rules, 47 C.F.R. § 1.1415, to "issue such other orders and so conduct its proceedings as will best conduce to the proper dispatch of business and the ends of justice," and

¹ / The Parties have agreed that privilege logs will be exchanged on August 10, 2007.

the Commission's stated goal that this hearing result in "a just, expeditious, and equitable resolution." Hearing Designation Order, DA 06-494, at ¶ 6 (rel. March 2, 2006).

Accordingly, for the reasons set forth herein, EAI's Motion should be granted and a protective order issued to protect EAI's right to assert all claims of privilege for the covered documents to which it may be entitled and to prevent EAI from being unfairly prejudiced by the premature production or disclosure of the covered documents to Complainants.

I. BACKGROUND

Because EAI was not directly involved in the sequence of events described below, the following description is based solely on the representations made by Complainants in their Motion to Compel Utility Support Systems, Inc.'s Compliance With Subpoena Duces Tecum, filed July 9, 2007 ("Motion to Compel").²

In September 2006, Complainants served upon nonparty USS a subpoena duces tecum requesting the production of certain documents or materials related to the instant proceeding. On or about October 27, 2006, USS produced approximately 250,000 pages of documents responsive to Complainants' request. *See* Motion to Compel at 4.

In June 2007, Complainants contacted counsel for USS regarding apparent redactions in six documents out of the approximately 250,000 pages produced by USS. *See* Motion to Compel at 6. USS responded by explaining that the redactions had been made on the basis of privilege. *Id.* at 6 – 7. On June 26, 2007, Complainants sent a letter to USS questioning the claim of

² / EAI's restatements herein of Complainants' assertions are presented *arguendo* for the limited purpose of describing events in which EAI was not directly involved, and thus should not be interpreted in any way as any form of endorsement or admission by EAI regarding any of the facts, assertions, or allegations set forth in Complainants' Motion to Compel or related pleadings. Accordingly, this description of events is presented without prejudice to EAI's right to challenge at a later date, if necessary, any of the facts, assertions, or allegations set forth in Complainants' Motion to Compel or related pleadings.

privilege and threatening to take action against USS unless Complainants received “a satisfactory response” by July 5, 2007. *Id.* at 8. USS responded with a second letter dated July 3, 2007, explaining, among other things, the claim of privilege. *Id.* Complainants then filed their Motion to Compel against USS on July 9, 2007.³

On July 12, 2007, USS filed a Motion to Strike Complainants’ Motion to Compel on the grounds that the Motion to Compel was improperly filed with the Commission and must instead be filed with a US district court, citing to Section 1.340 of the Commission’s Rules, 47 C.F.R. § 1.340. On July 13, 2007, EAI filed a brief Opposition to Complainants’ Motion to Compel in which EAI adopted the arguments set forth in USS’s Motion to Strike. Also on July 13, 2007, Complainants filed an Opposition to the USS Motion to Strike. On July 17, 2007, USS filed a Reply to Complainants’ Opposition.

II. COMPLAINANTS’ ACTIONS THREATEN TO DENY RESPONDENT EAI’S RIGHT TO ASSERT CLAIMS OF PRIVILEGE TO WHICH IT MAY BE ENTITLED

As the events described above demonstrate, Complainants, through written correspondence with USS and the filing of pleadings with the ALJ, are actively challenging USS’s statements that certain documents in USS’s custody are covered by privilege. At no time, however, did Complainants raise any of these issues directly with EAI. Moreover, as noted above, Complainants did not even bother to formally serve EAI, the party in interest, with a complete copy of their Motion to Compel against USS, *see* Exhibit 1, instead merely copying

³ / Although the Motion to Compel demands the production of certain documents for which EAI may assert a claim of privilege, Complainants did not formally serve EAI with a copy of the Motion to Compel, *see* Exhibit 1, nor have Complainants ever provided EAI with a copy of the complete Motion. Complainants did copy EAI’s in-house counsel on an e-mail transmitting an electronic copy of the Motion to Compel to the ALJ, Enforcement Bureau staff, and counsel for USS – however, this electronic copy did not include any of the exhibits cited to and relied on in Complainants’ Motion, and thus cannot be considered to constitute proper service.

EAI's in-house counsel on an e-mail transmittal of a copy of their Motion to Compel, without exhibits, to the ALJ, Enforcement Bureau staff, and USS's counsel.

Complainants' failure to acknowledge or recognize EAI's direct interest in the dispute between Complainants and USS regarding production of the covered documents would appear at first blush to indicate that Complainants simply misunderstand the nature of the privilege that USS has articulated – *i.e.*, that the privilege constraining the production of the covered documents does not belong to USS, but belongs instead to EAI, and is thus EAI's right to assert. If this were the case, the issuance of the requested protective order would be warranted in order to clarify that Complainants' challenges should be directed to EAI, not to USS, thus providing EAI its rightful opportunity to assert its claim of privilege and to respond to Complainants accordingly.

Yet it is apparent that Complainants clearly understand with whom the claim of privilege properly lies, since, in their Motion to Compel against USS, Complainants argue that “even if the privilege attached here, *it is not USS' privilege to assert ... [t]he privilege would belong to Entergy ...*” Motion to Compel at 16 – 17 (emphasis in original). Complainants then go on to state that “Entergy has made no attempt to assert any such privilege, even though Entergy counsel has been copied on the recent exchanges between USS and Complainants.” *Id.* at 17. This statement is yet another in a long chain of misrepresentations by Complainants regarding discovery in this proceeding.

First, Complainants' charge that EAI “has made no attempt to assert any such privilege” ignores the fact that EAI – like Complainants – has included claims of privilege among its objections throughout the discovery process. In addition, Complainants ignore the fact that, by mutual agreement of the Parties, privilege logs are not scheduled to be exchanged between EAI

and Complainants until August 10, 2007, and thus neither Party has had any basis for asserting, let alone challenging, a specific claim of privilege.

As Complainants acknowledge in their Motion to Compel, the issue of privilege did not even arise until it was raised by USS in its letter of June 19, 2007 to Complainants. The first time Complainants questioned any claim of privilege – and thus for the first time indicated that this was a potential point of dispute – was in their letter of June 26, 2007, to USS. And while Complainants *copied* EAI's in-house counsel on their June 26 letter to USS, the fact remains that Complainants' letter – and all of Complainants' demands – were *directed* at USS. Then, less than two weeks later, Complainants' filed a Motion to Compel directed against USS, not EAI (who was not even served).

At no time – either in their June 26 letter or otherwise – did Complainants make any effort to informally resolve their concerns directly with EAI, as they are obligated to do under the specific terms of the agreement between the Parties regarding the procedures to be followed in the event of a dispute over production as set forth in the August 22, 2006, letter from Complainants' counsel to the ALJ (a copy of which is attached as Exhibit 2), and as they have been explicitly charged to do by the ALJ. *See* Memorandum Opinion and Order, FCC 07M-06 (rel. Feb. 20, 2007), ¶ 5. Instead, Complainants ignored their clear obligations and went immediately to the ALJ with a Motion to Compel against USS in an effort to bypass EAI and obtain documents to which Complainants may not be entitled. Complainants' conduct and actions would thus appear designed to intentionally deny EAI its rightful opportunity to assert its claims of privilege.

This is not the first time in this proceeding that Complainants have used a collateral attack against a nonparty in an effort to obtain rulings from the ALJ that would be directly

adverse and prejudicial to EAI's rights and interests without providing EAI the appropriate notice or opportunity to respond. In its Opposition submitted on July 10, 2007, EAI described a Motion to Compel filed by Complainants against another nonparty, Windstream Communications, Inc. ("Windstream"). *See* Opposition to Complainants' Motion for Leave to File a Report and Supplemental Brief on Discovery-Related Matters and Response to Report and Supplemental Brief, filed July 10, 2007 ("July 10 Opposition") at 10 – 11. As is the case here, Complainants did not formally serve EAI with a copy of any of the formal filings they made against Windstream, including their Motion to Compel. *Id.* As in this case, Complainants' Motion to Compel against Windstream seeks to obtain rulings of law from the ALJ that are directly relevant to issues currently pending between Complainants and EAI, and which would thus directly and prejudicially affect EAI's rights and interests in this proceeding. *Id.* Finally, as in this case, Complainants used its collateral filings against a nonparty to present unsupported and conclusory statements and allegations regarding EAI, even though Complainants' dispute is purportedly with the nonparty against whom the filings were directed. *Id.* Complainants' actions to date clearly warrant the issuance of the requested protective order.

III. THE ISSUANCE OF A PROTECTIVE ORDER IS APPROPRIATE, JUST, AND NECESSARY TO PROTECT EAI AND PROVIDE FOR THE PROPER CONDUCT OF THIS PROCEEDING

Complainants use of collateral actions involving nonparties, together with their utter disregard for their obligations to EAI and before the ALJ on the handling of discovery-related disputes, serve – intentionally or otherwise – to effectively deprive EAI of its rights in this proceeding, including its right to assert any claims of privilege to which EAI may be entitled. Accordingly, EAI requests that the ALJ issue a protective order prohibiting the disclosure or production to Complainants of any documents currently in the custody of USS for which a claim of privilege has been or may be asserted unless and until EAI has been provided a full and fair

opportunity to assert on its own behalf any and all claims of privilege to which it may be entitled, including, but not limited to, the filing of pleadings or briefs on the merits of such claims and full participation in any hearing or other inquiry that the ALJ may decide to conduct with respect to these documents.

EAI further submits that, in the interests of equity and administrative and judicial efficiency, the consideration of any pending or forthcoming claims or challenges regarding privilege, as well as the filing of any pleadings regarding any such claims or challenges, should be stayed until at least fourteen business days after the Parties have exchanged privilege logs (which, as noted above, is currently scheduled by agreement of the Parties to take place August 10, 2007). This would allow the Parties sufficient time to evaluate each other's respective assertions of privilege within the fullest and most complete context possible, and would further provide the Parties time to address and attempt to informally resolve any differences of opinion regarding any specific assertions of privilege without the involvement of the ALJ. EAI notes that this time period is consistent with the terms of the August 22, 2006 letter regarding the procedures to be followed by the Parties in addressing discovery-related disputes. *See* Exhibit 2. To the extent the ALJ's involvement should become necessary to resolve a question of privilege, this time period would also allow the Parties to provide the ALJ with as full and complete arguments as possible (rather than "nickel-and-diming" each claim with a separate round of pleadings), thus allowing for a fair, efficient, and expeditious resolution of all privilege issues.

Finally, EAI respectfully requests that the ALJ order that copies of all filings, pleadings, motions, requests from action from the ALJ (other than requests for the issuance of subpoenas),⁴

⁴ / The ALJ has specifically directed the Parties that requests for the issuance of subpoenas are to be filed on an *ex parte* basis directly with the Office of the ALJ and are not to be served on

or any other submissions made in this proceeding be served on all Parties to this proceeding. Such a requirement would advance the interests of equity and justice by preventing any of the Parties from being unfairly prejudiced, whether inadvertently or otherwise, by any actions taken in this proceeding with respect to third parties.

EAI reiterates and clarifies that the instant Motion and requested protective order are not intended to address the merits of any claims of privilege or the merits of any challenges to such claims. Rather, the purpose of this Motion and requested order is simply to protect EAI's rights and standing to assert and advocate on its own behalf any claims of privilege that it may have before any ruling or other decision is made that may require the production of potentially privileged documents or materials to Complainants. Accordingly, notwithstanding the outcome of the instant Motion or any other pleading, ruling, or other action taken with respect to the covered documents, EAI hereby reserves its right, pursuant to Section 1.301(a)(2) of the Commission's rules, 47 C.F.R. § 1.301(a)(2), to appeal any ruling on a claim of privilege that would require the production or disclosure of the covered documents to Complainants.

EAI submits that the requested protective order is both necessary and appropriate under Section 1.313 of the Commission's Rules, as well as Sections 1.243(f) and 1.1415, because such an order would advance the interests of equity and justice by protecting against any unfair prejudice to EAI's rights and interests that would result from the premature production or disclosure to Complainants of any documents for which EAI may be entitled to assert a claim of privilege. EAI further submits that a protective order adopting the measures discussed above will facilitate a "just, expeditious, and equitable resolution" of any dispute regarding privilege by providing the Parties sufficient time to evaluate each other's respective claims, to attempt to

the other Parties. EAI hereby clarifies that its request is not intended to disturb in any way the ALJ's standing instructions with respect to subpoenas.

resolve any issues between them informally, and, if the involvement of the ALJ should be necessary, to provide the ALJ with full and complete arguments that can be addressed in a fair, efficient, and expeditious manner.

WHEREFORE, for the reasons set forth above, Respondent Entergy Arkansas, Inc., respectfully requests that its Motion for a Protective Order be granted and that EAI accordingly be provided the full relief requested herein and all other relief that the Administrative Law Judge should deem appropriate.

Respectfully submitted,



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Attorneys for Entergy Arkansas, Inc.

Dated: August 1, 2007

CERTIFICATE OF SERVICE

I, David D. Rines, do hereby certify that on this 1st day of August, 2007, a single copy (unless otherwise noted) of the foregoing "Motion for a Protective Order" was delivered to the following by the method indicated:

Marlene H. Dortch (hand delivery) **(ORIGINAL PLUS 6 COPIES)**
Secretary
Federal Communications Commission
445 12th Street, S.W., Room TW-A325
Washington, D.C. 20554

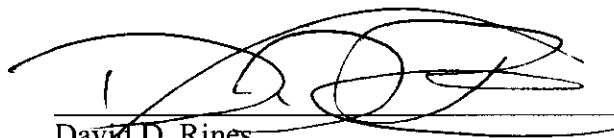
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David D. Rines

EXHIBIT 1

CERTIFICATE OF SERVICE


I, Coleen Lennon, hereby certify that on July 9, 2007, a copy of the foregoing **COMPLAINANTS' MOTION TO COMPEL UTILITY SUPPORT SYSTEMS, INC.'S COMPLIANCE WITH SUBPOENA DUCES TECUM** was hand-delivered, and/or placed in the United States mail, and/or sent via electronic mail, postage prepaid, to:

Marlene H. Dortch (Orig. & 6 copies)
Secretary, Federal Communications Commission
445 12th Street, S.W.
Room TW-A325
Washington, D.C. 20554

The Honorable Arthur I. Steinberg **
Administrative Law Judge
Office of the Administrative Law Judge
Federal Communications Commission
445 Twelfth Street, S. W.
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Coleen Lennon

* Served via U.S. Mail

** Also served via Electronic Mail

EXHIBIT 2

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August 22, 2006

J. D. Thomas
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BY HAND DELIVERY

The Honorable Arthur I. Steinberg
Administrative Law Judge
Federal Communications Commission
Washington, D. C. 20554

Re: Arkansas Cable Telecommunications Association *et al.* v. Entergy Arkansas, Inc. – EB Docket No. 06-53/EB-05 MD-004

Dear Judge Steinberg:

The purpose of this letter is to notify you of an agreement that Complainants Arkansas Cable Telecommunications Association, Comcast of Arkansas, Inc., Buford Communications I, L.P. d/b/a/ Alliance Communications Network; WEHCO Video, Inc., CoxCom, Inc. and Cebridge Acquisition, L.P., d/b/a Suddenlink Communications ("Complainants") and Entergy Arkansas, Inc. have reached with respect to any discovery disputes that may arise in the course of this proceeding. We have discussed this matter with Enforcement Bureau Staff Counsel, Mike Engel, and he has no objection to our agreement.

As the parties anticipated, the document production in this proceeding is voluminous and complex. As such, Complainants and Entergy Arkansas, Inc. have agreed that the production shall occur in stages. However, the parties' agreement regarding the phases of the production raises a question with respect to the application of Rule 1.325, 47 C.F.R. § 1.325, to our proceeding. Rule 1.325 specifies that motions to compel discovery responses must be filed within five (5) business days of the assertion of an objection or claim of privilege. Under the circumstances of the production in this case, adherence to this rule is extremely difficult if not impossible. Thus, the parties have reached the following agreement:

1. Consistent with the ALJ's direction at the pre-hearing conference, counsel for the parties will first attempt to resolve all discovery issues in a cooperative informal manner; and
2. To the extent that the parties reach impasse on a disputed item, they agree that (a) they will have fourteen (14) business days from the time that such impasse occurs to file a motion to compel; (b) any opposition to such motion shall be filed within

Judge Arthur I. Steinberg
August 22, 2006
Page 2

fourteen (14) business days after that; and (c) the non-moving party shall not oppose nor otherwise object to a motion to compel on the basis that it is or may have been untimely filed under Rule 1.325.

If you have any questions or concerns about this matter please do not hesitate to call me at 202.637.5675 or Gordon Rather at 501.212.1267.

Sincerely,

A handwritten signature in black ink, appearing to be "J. D. Thomas", written over a horizontal line.

J. D. Thomas

cc: Gordon S. Rather, Jr., Esq.
Mike Engel, Esq.